Filed 10/24/12 P. v. Guerra CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO GUERRA, Defendant and Appellant.	B239020 (Los Angeles County Super. Ct. No. MA050224) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

THE COURT:*

On the court's own motion, the above entitled matter, filed on October 16, 2012, is modified as follows:

In the third paragraph on the title page of the opinion, delete the name "Johathan M. Krauss" and replace it with "Jonathan M. Krauss."

There is no change in the judgment.

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* BIGELOW, P. J. RUBIN, J. FLIER, J.

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APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Johathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

A jury convicted appellant Fernando Guerra with one count of shooting at an inhabited dwelling, one count of shooting at an unoccupied vehicle, and two counts of assault with a firearm. The jury also found gang allegations to be true. Appellant contends (1) the trial court abused its discretion when it ordered him to wear a stealth belt tying him to his chair; and (2) there was insufficient evidence to convict him of count 1, shooting at an inhabited dwelling. We affirm.

STATEMENT OF FACTS

On August 27, 2010, at 6:30 p.m., Leticia Gonzalez (Leticia) was in her car with her brother, Agustin Gonzalez (Agustin),[1] and her boyfriend, Antonio Harris, at the drive-through dairy on Avenue I near the Friendly Village trailer park in Lancaster. Three male Hispanics in a gold or tan car pulled up to Leticia's car while she was getting gas and started "talking mess" to her, Agustin, and Harris. At trial, Leticia identified Steven Carvajal as the front seat passenger of the tan car. She also believed appellant might have been in the driver's seat. Harris identified Carvajal as the front seat passenger and appellant as the driver of the tan car.

Leticia was stopped at the dairy gas pumps and asked Harris for gas money. Right after, Carvajal said to Leticia in a loud voice, "What the f--- did you say? This is M.T.C." Agustin and Harris got out of Leticia's car and asked the three males in the tan car to stop disrespecting Leticia. An argument between Harris, Agustin, and Carvajal ensued, and Leticia eventually tried to get Harris to stop arguing with Carvajal because she saw that Carvajal was carrying a gun. The man in the back seat said to Carvajal, "It's nothing. Just go, fool. Just go." The tan car then drove around the gas pumps one time, stopped, and the passenger "cussed a little more" at Harris, Agustin, and Leticia. When the car came back around Leticia noticed the barrel of the gun that Carvajal had pulled from under his seat. Leticia told Agustin and Harris to get back into her car, and apologized to the men in the tan car. The tan car left the dairy and headed toward the direction of Friendly Village.

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[1] We refer to Agustin and Leticia by their first names rather than their surnames to avoid confusion between the two. We do not intend this informality to reflect a lack of respect.

At approximately 6:45 p.m., Arturo Gonzalez (Arturo), no relation to Leticia and Agustin,[2] saw a gold and tan car approach Friendly Village and heard the driver of the car yell, "F--- Cookie Monsters." "Cookie Monsters" is a derogatory name for the Crazy Minded street gang, of which Arturo is a member. Arturo knew that members of the Crazy Minded gang lived in the Friendly Village trailer park and they were enemies with other gangs in the Antelope Valley, including M.T.C. Arturo ran when he heard the driver of the tan car yell because he was afraid he was going to be shot.

Leticia and Harris were driving to Leticia's mother's house in Friendly Village when she saw Arturo and another man running away from the same tan car she had seen at the drive-through dairy earlier. Leticia noticed the men in the car were the same ones that had argued with her, Agustin, and Harris earlier. Arturo ran into Leticia's mother's house. The tan car parked on the same street as her mother's house. Carvajal got out of the car and tried to go through the back door of the mother's house, but he could not open the back door. He got back into the car, and the car drove around and parked behind Leticia's car. Leticia, Agustin, and Harris got out of Leticia's car and walked toward Leticia's mother's house when they saw her mother run out of the house screaming, "Leti, they tried to get in the house." Carvajal then took out a shotgun and pumped it. He pointed the gun at Leticia and her family as they were running away and fired the gun approximately four times. Carvajal then got back in the car, and it drove off.

Around 9:30 p.m. that same night, Leticia had left and was returning to her mother's house with Harris. Her father's truck, a Chevy Silverado, was parked in the driveway on the side of the house. As Leticia and Harris were walking up to the house, they saw Carvajal and three other men walking toward the house. When the men were about 26 or 27 feet from the house, Carvajal started shooting. She testified: "I don't know if he was aiming directly at my mom's, but it shot -- I don't know if the truck maybe blocked it, but the truck blocked the shots to my mom [because] the truck is right in front of my mom's room." She

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[2] As with Leticia and Agustin, we do not intend our use of Arturo's first name to reflect a lack of respect, but use it for the sake of clarity.

also said: "I don't know if they were literally trying to shoot somebody, but they were shooting towards my mom's room. . . . [¶] . . . [¶] . . . They were shooting at our house. If our truck -- our truck is slanted and our house is like this (indicating). So the tip of the truck is at my mom's room. . . . [¶] . . . [¶] [He shot at] the house, not towards. They were shooting, aiming towards inside our house, yes." At the time Carvajal was firing the gun, Leticia's mother and father, her three brothers, and her niece were all in the house.

After Carvajal fired the shotgun, he and the other three men jumped over a little wall separating Leticia's mother's house from the street and ran off. A neighbor called the police because Leticia and her family were worried that if they did so, Carvajal would "just keep coming back."

Deputies Jeremi Edwards and Eric Licciardi arrived at the scene shortly after the shooting. Leticia met the officers outside her mother's house and they realized that her father's truck had a bullet hole near the headlight and a second one near the tire. Deputy Edwards recovered two shotgun shell casings, one from the gutter in front of the house, and the other from the street a short distance away.

At approximately 9:00 p.m. that same night, Deputy Robert Heins and his partner received a call over their radio regarding a shooting at Friendly Village and a description of the individuals involved and the tan car they were driving. At approximately 11:00 p.m., Deputy Heins saw the vehicle described in the report pulling into a driveway and witnessed Carvajal and Angelo Hernandez get out and run into a house. Deputy Heins identified appellant as the driver of the vehicle. Appellant and the front seat passenger got out of the car after Carvajal and Hernandez, but the deputies stopped appellant and the passenger before they could run. After ordering Carvajal and Hernandez to come out of the house to no avail, the deputies entered the house and found them, a shotgun, a rifle, and shotgun ammunition. Appellant, Carvajal, and Hernandez were later taken to a field showup where witnesses identified Carvajal and appellant as the men involved in the shooting earlier in the night.

PROCEDURAL HISTORY

The information charged appellant with one count of shooting at an inhabited dwelling (Pen. Code, § 246),[3] one count of shooting at an unoccupied vehicle (§ 247, subd. (b)), and two counts of assault with a firearm (§ 245, subd. (a)(2)). It alleged that the offenses were committed for the benefit of a criminal street gang. Codefendants Hernandez and Carvajal were also charged in all four counts. They are not parties to this appeal. Early in the trial, after the jury was seated but before opening statements, Hernandez reached a plea agreement with the People. In the middle of the prosecution's case, due to a conflict within the Alternate Public Defender's Office, the court declared a mistrial as to Carvajal.

After the jury convicted appellant on all counts and found the gang allegations true, the court sentenced him to a total determinate term of 10 years eight months in state prison, followed consecutively by an indeterminate term of 15 years to life in state prison. Appellant timely appealed.

DISCUSSION

1. The Trial Court's Use of a Stealth Belt on Appellant Does Not Require Reversal

Appellant contends that the trial court committed prejudicial error when it ordered him to wear a stealth belt restraining him to his chair during trial. Because the trial court did not follow the standard our Supreme Court has set out for stealth belt restraints (*People v. Cox* (1991) 53 Cal.3d 618, 651(*Cox*)), we conclude the trial court erred. However, we find the error was harmless. We therefore decline to reverse his conviction on this basis.

A. Background

Right before the trial started, the trial court stated its intention to have appellant, Carvajal, and Hernandez stealth belted to their seats throughout the trial. The belt strapped appellant and his codefendants to their seats but was not a stun belt. The court explained that "from the outside, it looks just like a leather belt. But what it will do is it will attach to the chair behind [the defendants]. There's a metal hook there. The jury won't be able to see it at all. [The defendants] won't be handcuffed in front of the jury. [They] won't be

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3 All further statutory references are to the Penal Code.

shackled in any way." The court stated that it was stealth belting appellant and his codefendants because there had been various incidents of witness intimidation. Carvajal's uncle had approached and intimidated a witness inside the courthouse. Another witness was waiting for the bus outside the courthouse after testifying at an earlier hearing when she was attacked and called a snitch by three female Hispanics. Additionally, the court noted that Hernandez had three disciplinary reports stemming from his time in county jail, and Carvajal had a citation in the county jail for insubordination. The court also noted the "setup of [the] courtroom with there being three [defendants] and with a small courtroom," the stealth belt gave "a little bit of added security." Finally, the court cited the charges and allegations and the length of time each defendant was facing as factors in its decision. All three defendants objected to the stealth belting.

After Hernandez accepted a plea agreement, leaving just Carvajal and appellant on trial, Carvajal's counsel objected again, stating, "But my client's belt, you can still see --." The court responded: "[T]hey can't see the restraint. The restraint is in the back. The chairs are fully backed. There's no way they can see the restraint. [¶] . . . To the extent you can see the belt from the front, it looks like a belt one would wear with their pants. It's simply a black strip. [¶] . . . The restraint part of [the belt] is not in any way visible to the jurors in this case. It is a restraint that is welded to the bottom seat portion of the chair they're sitting back in. Their chairs -- the chairs have backs that cover the restraint."

B. Analysis

We review the trial court's decision to impose the stealth belt on appellant for abuse of discretion. (*People v. Duran* (1976) 16 Cal.3d 282, 291.) "[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*Id.* at pp. 290-291.) "'Manifest need' arises only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' [Citation.] Moreover, '[t]he showing of nonconforming behavior . . . must appear as a matter of record . . . .'" (*Cox, supra,* 53 Cal.3d 618, 651.)

That a defendant has been charged with a violent crime does not establish a sufficient threat of violence or disruption to justify physical restraints during trial, nor does a courthouse layout establish such. (*People v. Seaton* (2001) 26 Cal.4th 598, 652 (*Seaton*) [trial court abused its discretion in shackling defendant when shackling was based on the nature of the charged crime (violent murder) and the fact that the courtroom door was less than 40 feet from the public entrance].) There must be some "individualized suspicion" that the defendant will engage in nonconforming conduct. (*Ibid.*) Thus, the mere fact that the defendant is a prison inmate, standing alone, does not justify the use of physical restraints. (*People v. Miller* (2009) 175 Cal.App.4th 1109, 1114.)

In the case at bar, there was no showing of a manifest need for restraints with respect to appellant. There was no evidence that he had been unruly, announced an intention to escape, or had engaged in any other "nonconforming conduct." (*Cox*, *supra*, 53 Cal.3d at p. 651.) Evidence of his *codefendants'* nonconforming conduct while in jail did not establish an individualized suspicion as to appellant. (*Seaton*, *supra*, 26 Cal.4th at p. 652.) Moreover, there was no evidence that he had intimidated the witnesses or directed someone else to intimidate the witnesses. And appellant's charges, the length of time he was facing, and the fact that the courtroom might have been small were insufficient to establish a manifest need. (*Ibid.*; compare *People v. Stankewitz* (1990) 51 Cal.3d 72, 96-97 [manifest need for restraints when defendant had previously attempted to escape and continued to express plans to escape, had been violent with his attorney, had been violent with other inmates, and had threatened the trial judge and officers].) Accordingly, the trial court abused its discretion in imposing the stealth belt on appellant.

Still, the error was harmless and does not require reversal. (*Seaton*, *supra*, 26 Cal.4th at pp. 652-653 [concluding that the defendant failed to show prejudice and reversal was not warranted].) "[W]e have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense." (*People v. Anderson* (2001) 25 Cal.4th 543, 596.) Here, although Carvajal's defense counsel suggested that the jury could see the restraint, the court disagreed, stating that the stealth belt looked

like a belt one would wear with pants, to the extent the jury could see it at all. There was no evidence that the jury understood the belt to be a restraint. Furthermore, appellant offers no evidence that the belt impaired his ability to testify or participate in his defense. Under any standard of prejudice, the use of the belt did not prejudice appellant.

2. Sufficient Evidence Supported Appellant's Conviction for Shooting at an Inhabited Dwelling

Appellant argues that the evidence was insufficient to convict him of shooting at an inhabited dwelling because the evidence showed that the shooter targeted the Chevy truck, not the house. We disagree.

When a criminal defendant claims on appeal that his conviction was based on insufficient evidence, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We "must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Section 246 makes it a felony to maliciously and willfully discharge a firearm at an inhabited dwelling house. Shooting at an inhabited dwelling house is a general intent crime. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356.) As with all general intent crimes, the question is whether the defendant intended to do the proscribed act, not whether the defendant had the "specific intent to achieve a particular result (e.g., strike an inhabited or occupied target, kill or injure)." (*Id.* at p. 1357.) Thus, "section 246 is not limited to shooting *directly* at an inhabited or occupied target. Rather, it proscribes shooting *either* directly at *or* in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it." (*Id.* at pp. 1355-1356.) Moreover, the statute does not require that the house actually be hit by gunshot. (*Id.* at pp. 1353, 1362 [substantial evidence supported the § 246 instruction even when no evidence that the building was hit].)

People v. Chavira (1970) 3 Cal.App.3d 988 (*Chavira*) is instructive. In *Chavira*, the defendant and his associates fired several shots at persons "congregated in front of, and on the driveway leading to" an inhabited dwelling. (*Id.* at p. 993.) The defendant argued that the evidence was insufficient to support his section 246 conviction because he did not fire directly at the dwelling, but only at the persons gathered outside of it. (*Chavira*, at p. 992.) The court held that when the shooters fired a "fusillade of shots directed primarily at persons standing close to a dwelling," the jury was "entitled to conclude that [the defendants] were aware of the probability that some shots would hit the building and that they were consciously indifferent to that result," and thus they had an intent sufficient to satisfy section 246. (*Chavira*, at p. 993, fn. omitted.)

The evidence here was sufficient to support appellant's conviction, as in *Chavira*. Leticia said that appellant was shooting at her mother's house. The truck contained bullet holes. The evidence showed the truck was hit because it was parked right on the side of the house and blocked the shots to the house. Leticia said several times that the shooter was aiming for the house. In other words, the evidence showed the shooter was shooting either directly at the house or in such close proximity to it that he exhibited a conscious disregard for the probability that a bullet would strike the house and its inhabitants.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.